

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DAVID A.L. MONTALVO,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of the Social Security
Administration,

Defendant.

CASE NO. 3:15-cv-05809 JRC

ORDER ON PLAINTIFF'S
COMPLAINT

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S. Magistrate Judge and Consent Form, Dkt. 3; Consent to Proceed Before a United States Magistrate Judge, Dkt. 4). This matter has been fully briefed (*see* Dkt. 12, 13, 14).

After considering and reviewing the record, the Court concludes that the ALJ erred when considering the medical evidence as subsequent improvement with

1 medication is not inconsistent with marked limitations prior to taking the helpful
2 medication.

3 Therefore, this matter is reversed and remanded pursuant to sentence four of 42
4 U.S.C. § 405(g) to the Acting Commissioner for further consideration consistent with this
5 order.

6 BACKGROUND

7 Plaintiff, DAVID A.L. MONTALVO, was born in 1989 and was 22 years old on
8 the alleged date of disability onset of October 1, 2011 (*see* AR. 226-27, 228-33). Plaintiff
9 quit school after the 11th grade (AR. 38). Plaintiff last worked at a fast food restaurant,
10 but quit when he started having panic attacks and wanted to try truck driving school (AR.
11 39-41). But again, he began to have panic attacks and did not finish the school (*id.*).
12

13 According to the ALJ, plaintiff has at least the severe impairments of “Attention
14 deficit hyperactivity disorder, anxiety disorder, personality disorder, and depressive
15 disorder (20 CFR 404.1520(c) and 416.920(c))” (AR. 13).

16 At the time of the hearing, plaintiff was living in an RV trailer on his parents’
17 property (AR. 36).

18 PROCEDURAL HISTORY

19 Plaintiff’s applications for disability insurance (“DIB”) benefits pursuant to 42
20 U.S.C. § 423 (Title II) and Supplemental Security Income (“SSI”) benefits pursuant to 42
21 U.S.C. § 1382(a) (Title XVI) of the Social Security Act were denied initially and
22 following reconsideration (*see* AR. 63-72, 73-82, 85-98, 99-112). Plaintiff’s requested
23 hearing was held before Administrative Law Judge Mary Gallagher Dilley (“the ALJ”)
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1 on April 29, 2014 (*see* AR. 31-60). On August 25, 2014, the ALJ issued a written
 2 decision in which the ALJ concluded that plaintiff was not disabled pursuant to the Social
 3 Security Act (*see* AR. 8-30).

4 In plaintiff's Opening Brief, plaintiff raises the following issues: (1) The ALJ
 5 erred in rejecting the medical opinions of R.A. Cline, Psy.D, William J. Chalstrom, PhD,
 6 and R. Renee Eisenhauer, PhD; and (2) The errors were not harmless (*see* Dkt. 12, p. 1).

7 STANDARD OF REVIEW

8 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
 9 denial of social security benefits if the ALJ's findings are based on legal error or not
 10 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
 11 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
 12 1999)).

14 DISCUSSION

15 (1) **Did the ALJ err in rejecting the medical opinions of R.A. Cline, Psy.D,** 16 **William J. Chalstrom, PhD, and R. Renee Eisenhauer, PhD?**

17 Plaintiff contends that the ALJ erred when rejecting a number of medical opinions,
 18 including opinions from examining and non-examining doctors (*see* Dkt. 12, pp. 2-5).
 19 Defendant contends that these medical opinions were rejected properly (*see* Dkt. 13, pp.
 20 3-5).

21 When an opinion from an examining doctor is contradicted by other medical
 22 opinions, the examining doctor's opinion can be rejected only "for specific and legitimate
 23 reasons that are supported by substantial evidence in the record." *Lester v. Chater*, 81
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1 F.3d 821, 830-31 (9th Cir. 1996) (*citing Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir.
 2 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)); *see also* 20 C.F.R. §§
 3 404.1527(a)(2) (“Medical opinions are statements from physicians and psychologists or
 4 other acceptable medical sources that reflect judgments about the nature and severity of
 5 your impairment(s), including your symptoms, diagnosis and prognosis, what you can
 6 still do despite impairment(s), and your physical or mental restrictions”).

7
 8 The ALJ “may reject the opinion of a non-examining physician by reference to
 9 specific evidence in the medical record.” *Sousa v. Callahan*, 143 F.3d 1240, 1244 (9th
 10 Cir. 1998) (*citing Gomez v. Chater*, 74 F.3d 967, 972 (9th Cir. 1996)); *Andrews, supra*,
 11 53 F.3d at 1041). However, all of the determinative findings by the ALJ must be
 12 supported by substantial evidence. *See Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th
 13 Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)); *see also*
 14 *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989) (“Substantial evidence” is more
 15 than a scintilla, less than a preponderance, and is such ““relevant evidence as a reasonable
 16 mind might accept as adequate to support a conclusion””) (*quoting Davis v. Heckler*, 868
 17 F.2d 323, 325-26 (9th Cir. 1989)).

18 Dr. Cline examined plaintiff on November 16, 2012. She opined that plaintiff
 19 suffered from marked impairments in the areas of communicating and performing
 20 effectively in a work setting, completing a normal workday and workweek without
 21 interruptions from psychologically-based symptoms, and maintaining appropriate
 22 behavior in a work setting (AR. 340). The ALJ provided only “little weight” to Dr.
 23 Cline’s opinion (AR. 22).
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1 First, the ALJ found that plaintiff “was prescribed medication at that time, but was
2 apparently not taking paroxetine [Paxil], which the treatment record shows successfully
3 resolved his symptoms” (AR. 22 (*citing* AR. 338, 421-22)). However, there are two
4 problems with this finding by the ALJ. First, plaintiff *was* taking paroxetine at the time of
5 the evaluation by Dr. Cline (*see* AR. 338). As noted in Dr. Cline’s report, cited by the
6 ALJ in support of this finding, plaintiff “reports that he currently takes a daily anxiolytic
7 (possibly buspirone or Paxil) and has for the last three or four months with limited effect”
8 (*id.*). A treatment record from earlier that year demonstrates that plaintiff was started on
9 Paxil (paroxetine) on March 14, 2012 (AR. 389). The second problem with this finding
10 by the ALJ is that paroxetine was having only a “limited effect,” so the record does not
11 demonstrate that it was successfully resolving his symptoms (AR. 338).

13 It is possible that the ALJ meant to say that even though plaintiff was taking
14 paroxetine (Paxil) at the time of Dr. Cline’s examination, he was not yet taking fluoxetine
15 (Prozac), which the record *does* demonstrate provided some relief from symptoms in July
16 2013, approximately eight months after the November, 2012 evaluation and examination
17 by Dr. Cline (*see* AR. 424 (fluoxetine “was helpful for him”)). This interpretation of the
18 ALJ’s rationale is buttressed by the ALJ’s finding later in that paragraph that plaintiff’s
19 “treatment record shows that his symptoms did in fact improve when he took appropriate
20 medication” (AR. 22). However, the ALJ’s failure to credit fully Dr. Cline’s opinion
21 based on a finding that at the time of Dr. Cline’s opinion, plaintiff was not taking a
22 prescription that subsequently turned out to be helpful is not a legitimate basis for the
23 rejection of her opinions.
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1 Here, the record indicates that plaintiff was taking his prescribed medication at the
2 time Dr. Cline provided her opinion, but that he was not taking fluoxetine, which appears
3 to have helped his symptoms subsequently, after it eventually was prescribed (*see* AR.
4 338, 421). The fact that plaintiff was taking his prescribed medications, but that his
5 doctor had as of yet failed to identify a prescription that would help alleviate his
6 symptoms does not demonstrate that Dr. Cline's opinions about plaintiff's functional
7 limitations at the time of her evaluation were inaccurate. This is not a legitimate reason
8 for failing to credit fully the medical opinions of examining doctor, Dr. Cline.
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10 In addition, Dr. Cline examined plaintiff on November 16, 2012. The treatment
11 record cited by the ALJ in support of her finding that a subsequent prescription
12 successfully resolved his symptoms is from December 20, 2013 (AR. 22 (*citing* 421-22)).
13 Therefore, even if plaintiff's symptoms were successfully resolved in late 2013, he still
14 may have been disabled in November 2012, and could have been disabled through
15 December 2013. As plaintiff's alleged date of disability onset is October 1, 2011, plaintiff
16 could have been disabled for over two years before his symptoms resolved. Indeed, on
17 July 1, 2013, plaintiff's treating physician opined that his depression was "unresolved"
18 and that the dosage of his medication should be increased (AR. 425). The fact that
19 plaintiff's symptoms would be resolved approximately a year in the future is not a
20 legitimate basis for the failure to credit fully the contemporaneous opinions of examining
21 physician Dr. Cline at a time when they were not yet resolved.
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23 Defendant also contends that the failure to credit fully the opinion of Dr. Cline is
24 proper because Dr. Cline opined that plaintiff would be limited for maximum of 12

1 months and in order to meet “the duration requirement,” an impairment must last for at
2 least 12 months (Dkt. 13, p. 3). The fact that Dr. Cline opined that plaintiff could be
3 limited for 12 months indicates that she opined that the impairment could meet the
4 duration requirement. This is not a legitimate basis for the failure to credit fully her
5 opinion.

6 On May 15, 2013, Dr. Chalstrom examined plaintiff and provided his opinion (*see*
7 AR. 378-82). Dr. Chalstrom observed that plaintiff “had a sad affect, which was
8 congruent with his stated mood,” of being depressed and anxious (AR. 380). Dr.
9 Chalstrom diagnosed plaintiff with panic disorder with agoraphobia; generalized anxiety
10 disorder; depressive disorder, NOS; and personality disorder, NOS, with cluster C traits
11 (*id.*). Dr. Chalstrom opined that plaintiff “would have difficulty getting along with
12 supervisors, coworkers, and especially the general public, in a work situation” (AR. 382).
13 Dr. Chalstrom also opined that plaintiff “would have difficulty responding appropriately
14 to changes in a workplace” (*id.*).

15 The ALJ provided only “some weight” to the opinions of Dr. Chalstrom (AR. 22).
16 The reason provided by the ALJ for his failure to credit fully the opinions of Dr.
17 Chalstrom was that plaintiff’s “symptoms did improve with appropriate treatment” (*id.*
18 (*citing* AR. 421-22)). Again, the record cited by the ALJ to support her finding of
19 improvement of symptoms is from December 20, 2013 (*see* AR. 22, 421-22). As Dr.
20 Chalstrom provided his opinion on May 15, 2013, the fact that plaintiff’s symptoms
21 subsequently improved over seven months later is not a legitimate basis for the failure to
22 reject the opinions of Dr. Chalstrom regarding plaintiff’s functioning at the time of his
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1 evaluation. Although it may be true that plaintiff's symptoms improved to the extent that
2 he was not disabled in December, 2013, this fact does not demonstrate that plaintiff was
3 not disabled in May of 2013.

4 Similarly, the ALJ rejected the medical opinion of Dr. Eisenhower on November
5 12, 2012, provided after a review of some of plaintiff's records (AR. 22). Although Dr.
6 Eisenhower opined that plaintiff suffered from marked limitations in his ability to
7 communicate and perform effectively in a work setting, maintain appropriate behavior in
8 a work setting, and complete a normal workday and workweek without interruptions
9 from psychologically-based symptoms, the ALJ found that this opinion "is not consistent
10 with the claimant's most recent treatment records, which indicate that he has had
11 successful treatment with appropriate medication" (AR. 22 (*citing* AR. 421-22)). The
12 opinion that plaintiff was suffering from marked limitations before he received successful
13 treatment with appropriate medication is not an inconsistency. Plaintiff may have
14 experienced relief from his symptoms in December 2013, but this is not inconsistent with
15 an opinion that as of November 12, 2012, plaintiff was experiencing marked limitations.
16 Therefore, the Court concludes that the ALJ's finding of an inconsistency between
17 marked limitations in November 2012 and an improvement in symptoms in December
18 2013, after receiving a different prescription, is not a finding based on substantial
19 evidence in the record as a whole.
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21 Finally, although not explicitly stated, implied in the ALJ's reasoning is a finding
22 that because fluoxetine resolved plaintiff's symptoms in late 2013, that this prescription
23 necessarily would have resolved his symptoms previously, had it been prescribed earlier
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1 by his treating physician. However, not only is this not the factual circumstance presented
2 herein, but also, any such finding would be speculation and not a finding based on
3 substantial evidence in the record as a whole. *See* SSR 86-8, 1986 SSR LEXIS 15 at *22
4 (an ALJ may not speculate).

5 The Court also notes that there appears to be an error in the treatment record (AR.
6 422). On December 20, 2013, the treatment record indicates that plaintiff's "symptoms
7 responded well to the paroxetine that he had been taking earlier this fall," and that this
8 treatment would be restarted (*id.*). However, this may be a dictation error as the record
9 demonstrates that in the fall plaintiff had been taking *fluoxetine*, not paroxetine, which
10 "was helpful for him," although it appears that he was not yet receiving sufficient
11 symptom relief as he thought that "a higher dose might take away more of his depression
12 symptoms and his anxiety" and his treating physician opined that his depression was
13 "unresolved" and therefore increased his dosage of fluoxetine (AR. 424-25). In addition,
14 paroxetine had been described as having a "limited effect" on plaintiff's symptoms (*see*
15 AR. 338). Finally, in the treatment record that (perhaps erroneously) indicates that the
16 paroxetine that plaintiff had been taking in the fall had helped plaintiff symptoms and
17 was to be restarted, plaintiff's medications list includes fluoxetine (and does not include
18 paroxetine), and the plan indicated that a prescription for fluoxetine would be written (*see*
19 AR. 421, 422). Perhaps the only reasonable interpretation of this record is that the
20 physician meant to say (or did say and was mis-transcribed) that plaintiff was going to
21 restart treatment with fluoxetine, as his symptoms had responded well to the fluoxetine.
22 As fluoxetine is what she actually prescribed, and as this is the prescription that plaintiff
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1 had been taking in the fall, and appears to be the only prescription that helped plaintiff's
2 symptoms, this appears to be the most logical interpretation of the record. If the ALJ
3 found this record to be ambiguous, or following remand of this matter finds this record to
4 be ambiguous, she had a duty to develop the record on this issue, and re-contact the
5 physician if necessary. *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001)
6 (*quoting Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996) (*quoting Brown v.*
7 *Heckler*, 713 F.2d 411, 443 (9th Cir. 1983) (per curiam))) (The ALJ "has an independent
8 'duty to fully and fairly develop the record and to assure that the claimant's interests are
9 considered'"); *see also Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001) (the
10 ALJ's duty to supplement the record is triggered if there is ambiguous evidence or if the
11 record is inadequate to allow for proper evaluation of the evidence).
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13 For the reasons stated and based on the record as a whole, the Court concludes that
14 the ALJ erred when evaluating the medical evidence. All of the medical evidence should
15 be evaluated anew following remand of this matter.

16 (2) **Were the ALJ's errors harmless?**

17 Plaintiff contends that the ALJ's errors are not harmless because the residual
18 functional capacity ("RFC") assessment did not include all of the limitations opined by
19 Drs. Cline, Chalstrom and Eisenhauer (*see* Dkt. 12, pp. 4-5). Defendant contends that
20 plaintiff has not shown that the errors are harmful, but does not offer any explanation as
21 to why the ALJ's failure to include the opined limitations into plaintiff's RFC was
22 harmless (*see* Dkt. 13, p. 5).
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1 The Ninth Circuit has “recognized that harmless error principles apply in the
2 Social Security Act context.” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
3 (citing *Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th
4 Cir. 2006) (collecting cases)). Recently the Ninth Circuit reaffirmed the explanation in
5 *Stout* that “ALJ errors in social security are harmless if they are ‘inconsequential to the
6 ultimate nondisability determination’ and that ‘a reviewing court cannot consider [an]
7 error harmless unless it can confidently conclude that no reasonable ALJ, when fully
8 crediting the testimony, could have reached a different disability determination.’” *Marsh*
9 *v. Colvin*, 792 F.3d 1170, 1173 (9th Cir. July 10, 2015) (citing *Stout*, 454 F.3d at 1055-
10 56). In *Marsh*, even though “the district court gave persuasive reasons to determine
11 harmlessness,” the Ninth Circuit reversed and remanded for further administrative
12 proceedings, noting that “the decision on disability rests with the ALJ and the
13 Commissioner of the Social Security Administration in the first instance, not with a
14 district court.” *Id.* (citing 20 C.F.R. § 404.1527(d)(1)-(3)).

16 Here, there were various opinions from Drs. Cline, Chalstrom and Eisenhower that
17 were not included into plaintiff’s RFC, such as that plaintiff suffered from marked
18 limitation in the areas of communicating and performing effectively in a work setting,
19 completing a normal workday and workweek without interruptions from psychologically-
20 based symptoms, and maintaining appropriate behavior in a work setting (AR. 340); and
21 that plaintiff “would have difficulty getting along with supervisors, coworkers, and
22 especially the general public, in a work situation” and “would have difficulty responding
23 appropriately to changes in a workplace” (AR. 382; *see also* AR. 15). The ALJ relied on
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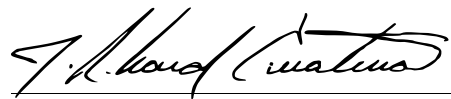
1 this incomplete RFC when providing a hypothetical to the vocational expert, on whose
2 testimony the ALJ relied when making the ultimate determination regarding disability
3 (*see* AR. 24-25). A reasonable ALJ when fully crediting this opinion evidence could have
4 made a different determination regarding disability. Therefore, the Court cannot conclude
5 with confidence that “no reasonable ALJ, when fully crediting the testimony, could have
6 reached a different disability determination.” *Marsh*, 792 F.3d at 1173 (*citing Stout*, 454
7 F.3d at 1055-56). Therefore, the errors are not harmless.

8 CONCLUSION

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10 Based on the stated reasons and the relevant record, the Court **ORDERS** that this
11 matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §
12 405(g) to the Acting Commissioner for further consideration consistent with this order.

13 **JUDGMENT** should be for plaintiff and the case should be closed.

14 Dated this 25th day of April, 2016.

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17 J. Richard Creatura
18 United States Magistrate Judge
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